Supreme Court, U. S.

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JAMES D. MAHER, CLERK

NO. 39.

WILLIAM HOLDER,

Plaintiff in Error,

vs.

AULTMAN, MILLER & COMPANY,

(A Corporation)

Defendant in Error.

Brief of Defendant in Error.

FRED A. BAKER,

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JOHN A. BRADLEY,
Of Counsel.

Detroit, Mich.,
JOHN S. BEY & CO., PRINTERS.
1917.

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

WILLIAM HOLDER,
Plaintiff in Error.

vs.

AULTMAN, MILLER & CO.,
A CORPORATION,
Defendant in Error.

No. 109.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

At the legislative session of 1891 the Michigan Legislature passed the following act:

"An Act to provide for the payment of a franchise fee by corporations.

"Section 1. The People of the State of Michigan enact, That every corporation or association hereafter incorporated by or under any general or special law of this State shall pay to the Secretary of State a franchise fee of one-half of one mill upon

each dollar of the authorized capital stock of such corporation or association and a proportionate fee upon any and each such subsequent increase thereof: Provided, That the fee herein provided for shall in no case be less than five dollars.

"Sec. 2. The Secretary of State shall not receive for filing or record the articles of association of any corporation or association unless accompanied by the fee provided for in this act.

"Sec. 3. The fees collected under the provisions of this act shall be paid into the State treasury and placed to the credit of the general fund."

Public Acts 1891, p. 240.

In 1893 Sec. 1 of the foregoing act was amended so as to read:

"Section 1. The People of the State of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the Secretary of State, and every foreign corporation or association which shall hereafter be permitted to transact business in this State (which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein), shall pay to the Secretary of State a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, That the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorpor-

ated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

Public Acts 1893, p. 82.

It will be observed that the Act of 1891 only applied to such corporations as might be thereafter organized under the laws of Michigan, and had no application to corporations organized in other States.

This was changed by the amendatory Act of 1893, so as to make the Act applicable to all foreign corporations "which shall hereafter be permitted to transact business in this State."

An exception is made of foreign corporations which "prior to the passage of this act have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein." This exception has reference to foreign corporations which had previously complied with the provisions of an Act, approved June 20, 1889, amending the Act of 1885 for the incorporation of manufacturing companies, and which amendatory Act is as follows:

"Sec. 37. Corporations organized under the laws of any State of the Union, or of any foreign country, either wholly or in part, for any of the purposes contemplated by this Act, upon recording copies of their charter, or articles of incorporation, or memoranda of association, as provided in Section 9 of this Act, and upon filing in the office of the Secretary of State a resolution, as required in general section 4331 of Howell's Annotated Statutes, and appointing an agent for service of process, may, for such purposes, carry on business in this State, and shall enjoy all the rights and privileges, and be subject to

all the restrictions and liabilities of corporations existing under this Act."

Public Acts 1889, p. 195.
3 How. Stat., Sec. 4161 d6.

Section 9 of the Manufacturing Act of 1885 simply provides that before any corporation organized under it shall commence business, its articles of association shall be recorded in the office of the Secretary of State and in the office of the County Clerk of the county where the operations of the corporation are to be carried on.

3 How Stat., Sec. 4161, a8.

Section 4331 of Howell's Statutes requires each foreign insurance company doing business in Michigan to file a resolution with the Secretary of State authorizing service of process upon its agents in this State.

Section 37 quoted above of the Act for the Incorporation of Manufacturing Companies, requires foreign corporations organized "either wholly or in part for any of the purposes contemplated by this Act" to file their articles, and otherwise to "be subject to all the restrictions and liabilities of corporations existing under this Act."

The amendment of 1893 to the Act of 1891, requiring the payment of a franchise fee, makes it necessary for the foreign manufacturing corporation, in addition to the filing of its articles, to pay the same franchise fee as is required of the domestic corporation when it is organized, so that in substance the foreign corporation becomes incorporated under the laws of Michigan, and is made subject to all the restrictions and liabilities imposed by those laws.

There does not appear to be any legislation expressly requiring foreign corporations, other than manufacturing, to file their articles of association in Michigan or subjecting them generally to the laws of the State, but the payment of a franchise fee of one-half of one mill upon each dollar of authorized capital stock

is imposed upon all foreign corporations without distinction or qualification by the Act of 1893.

According to this legislation, if valid, no foreign corporation after January 1, 1894, could or can be permitted to transact business in Michigan unless it first pays the franchise fee prescribed by the Act; and all contracts made in that State since that date by such corporations, which have not first paid the franchise fee, are wholly void.

FINDINGS OF FACTS.

First—On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "Copy of Contract," is hereinafter set forth. Said contract was executed, accepted and approved as set forth in said contract, and in the endorsement on the back thereof.

Second—The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled.

Third—There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56).

Fourth—Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the City of Akron, County of Summit and State of Ohio, and having its manufactory at the same place.

Fifth—Aultman, Miller & Company do not manufacture any goods whatever within the State of Michigan.

Sixth—Aultman, Miller & Company sells its goods in Michigan by means of local commission agents, and it has a general agent at the City of Lansing, in Michigan, and its commission agents are under similar contracts with the plaintiff to the one set forth in this action.

Seventh—All contracts are sent to Aultman, Miller & Company at Akron, for approval or rejection, before taking any effect.

Eighth—The goods sold by Aultman, Miller & Company in the State of Michigan, and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent, or in bulk to Lansing or various points throughout the State, and re-shipped in smaller lots direct to the commission agent.

Ninth—Aultman, Miller & Company own a warehouse in the City of Lansing for the transfer of such re-shipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth—Accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh—The plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistants check over the season's work with the commission agent, collect pay for the machines sold, in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth—All notes taken by the commission agents of Aultman, Miller & Company are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth—Aultman, Miller & Company has never filed a copy of its articles of association in the office of the Secretary

of State of the State of Michigan, or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan, or in any way complied or attempted to comply with Section 1 of an Act of the Michigan Legislature entitled "An Act to provide for the payment of a franchise fee by corporations," approved July 2, 1891, as amended by Act No. 79 of the Public Acts of Michigan of 1893, approved May 13, 1893. (Public Acts 1891, p. 240; Public Acts 1893, p. 82.)

COPY OF CONTRACT.

This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the State of Ohio), of Akron, Ohio, of the first part, and Wm. Holder, of Laingsburg, County of Shiawassee, and State of Michigan, of the second part, Witnesseth: That the party of the second part is hereby authorized to sell Buckeye Mowers, Reapers and Binders, and extra parts thereof, in the following territory, viz.: Laingsburg and vicinity and Elsie and vicinity, including the Townships of Washington and Elba, in Gratiot County, Chapin, in Saginaw County, and the west half of Fairfield, in Shiawassee County, for and during the season of 1894, on the following terms and conditions, viz.: The party of the second part agrees:

First—To use all reasonable diligence in canvassing and supplying said territory with said machines, and in maintaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines, and harvesters and binders, and not to convass or solicit orders outside of the above territory.

Second—To sell the said machine at the retail list prices authorized by said first party, with freight and charges from Laingsburg added thereto, on the following terms, viz.: One-half October 1, 1894, one-half October 1, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only, for which

settlement must be made with the purchaser on the delivery of machines; and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts; to see that all notes taken for machines sold are drawn on blanks furnished by the said first party, and signed by one or more persons of well-known responsibility; and in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal, amply sufficient to secure a payment in full of all such notes; all notes to bear interest as specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of said notes were not signed by persons of well-known responsibility, then the party of the second part agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third—To endorse with waiver of protest and notice of non-payment, all notes given by renters, and parties owning no real estate, unless sufficiently secured by chattel mortgage or otherwise, and all notes which on examination by a banker, or other competent authority, chosen by the first party or its general agent, or pronounced not good or insufficiently secured.

Fourth—That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co., until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promptly remitted to Aultman, Miller & Co., Akron, Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part, to said party of the

first part, shall be collectible without any relief whatever from valuation or appraisement laws.

Fifth—To see that all machines sold are properly set up and started, and, as far as possible, that they give satisfaction to the purchaser; and to keep a correct record of sales, showing the name and postoffice address of each purchaser, with price, terms and date of sale; said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth—To receive all machines, extras or other goods shipped or delivered on account of said first party; to pay the freight on them, keep them well housed, well cared for, free from taxes, and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co., as their interest in said property may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same; ordinary freight charges in all cases to follow machines and extras reshipped; but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh—In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original, and in all cases of repairs so furnished, to have on hand the broken or defective pieces to show at settlement, and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed; and in no case whatever to take from any machine belonging to the first party any part thereof as extras or repairs; to pay at settlement for all machines on hand, in case of a violation of this clause.

Eighth—To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent;

to promptly execute orders for transfer of machines, if any are on hand unsold; and in case of failure to make such reports or transfers, to pay said first party for all machines remaining on hand at settlement, unsold by reason of such failure, at the option of said first party.

Ninth—To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract, and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth—To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh—To publish a notice of this agency in one or more newspapers in the above named territory during the months of April, May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above described territory.

The party of the first part further agrees with the party of the second part:

First—To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor on machines which have for any cause been returned, and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made; and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second—To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines, and making collections, whenever required, a commission equal to an amount which, deducted from the price for which the machines have been sold, after deducting other allowances of every nature, will make the net amount to be retained by the said first party in notes and cash in the same proportion as taken for machines sold as follows, freights allowed:

	Width of Cut.	If sold for Cash	If sold for Notes.
Buckeye Light Mower, (one horse)	3 feet 9 in.	$32.00	$34.00 each
Buckeye Light Mower	4 feet 3 in.	33.00	35.00 "
New Buckeye Mower	4 feet 6 in.	34.00	36.00 "
New Buckeye Mower, (to combine)	4 feet 6 in.	.....	..... "
Buckeye Mower	5 feet.	35.00	37.00 "
Buckeye Mower	6 feet.	40.00	42.00 "
New Buckeye Table Rake	5 feet 2 in.	.....	..... "
New Buckeye Dropper	5 feet 2 in.	.....	..... "
.....		.....	..... "
Buckeye Frameless Binder	5 feet.	90.00	90.00 "
Buckeye Frameless Binder	6 feet.	90.00	95.00 "
Buckeye Frameless Binder	7 feet.	.....	..... "
.....		.....	..... "
Buckeye Banner Binder	5 feet 3 in.	90.00	95.00 "
Buckeye Bundle Carrier for Binders.		4.50	..... "
Buckeye Flax and Clover Dump		2.70	..... "
Buckeye Binder Truck, 2-Wheeled.		6.75	..... "

Where an outfit consisting of Binder, Trucks and Bundle Carrier is sold to one person the net cash price shall be $95.00. Time price $95.00 for 5 ft. Machines and $95.00 cash or $100.00 time for 6 ft. Machines.

Third—To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvases, pitman ferrules, spring keys, brass boxes, chain links, bolts and other net goods), from the prices of which as found in the published price list a commission of 25 per cent. will be allowed; all such extras sold to be paid for in cash on demand of the first party or their authorized agent.

Fourth—To sell to said second party knives and sickles, and knife and sickle heels, guards, sections and rivets, at a discount of 50 per cent., and pitman ferrules, spring keys, brass boxes, chain links, canvases, bolts and other net goods, at a discount of 50 per cent., all to be paid for in cash on or before the first day of August, 1894.

Fifth—To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

Notice.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expense of making such settlements. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

No canvasser or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him. Nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement, and the first party reserves the right to rescind or annul this contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, The parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT,
WM. HOLDER.

This contract not valid unless countersigned by our manager at Lansing, Mich., and App. at Akron.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, Manager.

Across the back of the foregoing contract is the following endorsement: "Approved April 29, 1894. Ira M. Milloy, Secretary."

Aultman, Miller & Co. brought an action of assumpsit in the Circuit Court of the United States for the Eastern District of Michigan to recover from William Holder the amount due it under the contract at the end of the season of 1894, viz., $5,052.56. (Record, pp. 1-6.)

The defendant, in his plea and notice, insisted that the failure of the plaintiff corporation to pay the franchise fee required by the laws of Michigan rendered the contract with him wholly void. (Record, pp. 8-9.)

On a trial before the Hon. Henry H. Swan, District Judge, the court made the findings of fact above set forth, and upon the facts so found, reached the following conclusions, or

FINDINGS OF LAW.

On the above and foregoing findings of facts the Court finds the following conclusions or findings of law:

1. The business of Aultman, Miller & Co., as carried on under and in pursuance of the said contract, is an inter-state commerce business, and said company is not subject to section 1 of the Michigan Franchise Fee Act of 1891, as amended by Act No. 79 of the Public Acts of Michigan of 1893, and said last named act in so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co. which are doing in Michigan an inter-state commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

2. Said contract was made and executed in the State of Ohio, and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an inter-state commerce business, and the plaintiff is, therefore, within the protection of the Constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56 with interest at six per cent. from Nov. 3, 1894, and a judgment will, therefore, be entered in favor of the plaintiff and against defendant for $5,212.56 and costs of suit to be taxed.

HENRY H. SWAN,
District Judge.

(Record, p. 23.)

The defendant, William Holder, brings the case to this court for review on a writ of error.

I.

The Michigan Franchise Fee Act is a revenue or tax law, and not a law for the regulation and control of corporations under the police power of the State.

In Michigan we have taxes that are known as specific State taxes.

Art. XIV of the State Constitution, entitled "Finance and Taxation," contains these provisions:

"Sec. 1. All specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the primary school, university and other educational funds," etc.

"Sec. 10. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes, from banking, railroad, plank road and other corporations hereafter created."

"Sec. 11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

At the time the present Constitution of the State was adopted, in 1850, and ever since then the statutes of the State have provided for the collection of specific State taxes from corporations.

Rev. Stat. of Mich., 1846, p. 121.
1 How. Stat. of Mich., 1882, p. 366.

The franchise fee tax is a substantial one. A corporation with an authorized capital of $100,000 is required to pay $50, and one with an authorized capital of $1,000,000 is required to pay $500.

II.

The Michigan business of Aultman, Miller & Co. is an interstate commerce business and nothing else.

In support of this proposition we rely upon the following facts:

1. The binders and mowers and their extras, or repairs, shipped by Aultman, Miller & Co. to their local agents in Michigan remain the property of the company until actually sold to a purchaser, and the money or notes received from the purchaser, are received by the local agent as the money or notes of Aultman, Miller & Co.

2. The binders and mowers and their extras and repairs when stored in the company's warehouse in Lansing, and when in the possession of the local agents of the company are simply in transit from the factory of the company in Ohio, to those who have or may become the purchasers of the same, and until sold and delivered to a purchaser they do not become commingled with and a part of the property in the State.

Both of these things are required by the fourth subdivision of the contracts between the company and its local agents. (Record, p. 20.)

The cases in this court upon which we rely are the following:

Brown vs. Maryland, 12 Wheat., 419.
Robbins vs. Shelby Taxing District, 120 U. S., 489.
Asher vs. Texas, 128 U. S., 129.
Leisy vs. Hardin, 135 U. S., 100.
Lyng vs. Michigan, 135 U. S., 161.
Brennan vs. Titusville, 153 U. S., 289.
Covington, etc., Bridge Co. vs. Kentucky, 154 U. S., 204.

In the two cases last cited this court had occasion in able and learned opinions prepared by Mr. Justice Brewer and Mr. Justice Brown respectively, to make an exhaustive and authorita-

tive examination of the prior cases, and a final exposition of the commercial clause of the Constitution.

In Covington, etc., Bridge Co. v. Kentucky, 154 U. S., 204, it appeared that the bridge company was a corporation created by the concurrent action of the States of Kentucky and Ohio for the purpose of constructing and maintaining a bridge across the Ohio river for the purposes of public travel between the two States. The company was authorized by the original acts of incorporation to fix the rates of toll for passing over the bridge, but it was required from time to time to reduce the rates of toll so that the net profits of the bridge should not exceed fifteen per cent. per annum.

After the bridge had been in use many years the Legislature of Kentucky passed an act fixing rates of toll much less than those fixed by the company, and which it was estimated would reduce its net profits to less than two per cent. per annum.

Four of the judges of the Supreme Court of the United States held that the original acts of incorporation constituted a contract between the corporation and both States which could not be altered by the one State without the consent of the other.

The majority of the court, however, in an opinion delivered by Mr. Justice Brown, based their decision on the commercial clause of the Constitution, and held:

(1) That the traffic across the river was inter-state commerce;

(2) That the bridge was an instrument of such commerce;

(3) That the statute was an attempted regulation of such commerce which the State had no constitutional power to make;

(4) That Congress alone possesses the requisite power to enact a uniform scale of charges in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within its territory.

The following are instructive extracts from the opinion, the authorities cited being omitted:

"The power of Congress over commerce between the States and the corresponding power of individual States over such com-

merce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress, and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over the general subject of commerce are divisable into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

"The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect inter-state commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference.

"Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; quarantine and inspection laws and the policing of harbors; the improvement of navigable channels; the regulation of wharfs, piers, and docks; the construction of dams and bridges across the navigable waters of a State; and the establishment of ferries.

"Of this class of cases it was said by Mr. Justice Curtis: 'If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it

is not the mere existence of such a power, but its exercise by Congress, which may be incompatiable with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations.'

"But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the State. As matter of fact, the building of bridges over waters dividing two States is now usually done by congressional sanction. Under this power the States may also tax the instruments of inter-state commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

"But wherever such laws, instead of being of a local nature and not affecting inter-state commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and this case falls within the third class—of those laws wherein the jurisdiction of Congress is exclusive. Subject to the exceptions above specified, as belonging to the first and second classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation upon commerce between the States. That, while the States have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several States, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities."

In Brennan v. Titusville, 153 U. S., 289, the court held an ordinance of the city of Titusville, Pa., invalid because it was in conflict with the commercial clause of the Constitution of the United States.

The ordinance was as follows:

"That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treas-

urer therefor the following sums, according to the time for which said license shall be granted, viz.: For one day, $1.50; one week, $5.00; three months, $10.00; one year, $25.00; provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city."

Mr. Justice Brewer, in delivering the opinion of the court, first made the following comments on the case:

"The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one State can send an agent into another State to solicit orders for the products of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods.

"It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two States. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to-wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no dis-

crimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling house for the purposes of making sale. We do not mean to say that none of these matters to which we have referred are within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented."

Justice Brewer next discussed the question whether the Titusville ordinance could be sustained as an exercise of the police power, and among other things he said:

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects inter-state commerce, can be sustained. It is undoubtedly true that there are many police regulation which no affect inter-state commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon inter-state commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of inter-state commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a direct burden on inter-state commerce is not open to question."

After referring to some of the cases he continued:

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in inter-state commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of exaction until all inter-state commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of inter-state commerce is committed by the Constitution of the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent regulate it."

This learned judge then proceeds to make the following instructive comments on the prior decisions of the court. We quote these comments in full because they contain an authoritative analysis of the prior cases:

"These questions of interference by State regulations with inter-state commerce have been frequently before this court, and it may not be unwise to examine a few of them. Welton v. State of Missouri, 91 U. S., 275, presented these facts: Welton was indicted and convicted for acting as a peddler under a statute defining a peddler to be one 'going from place to place to sell' goods not the growth, produce, or manufacture of the State, and prohibiting anyone from peddling without a license. The conviction was set aside by this court. It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.

"Robbins v. Shelby Taxing District, 120 U. S., 489, was a case closely in point. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sales of goods for a Cincinnati firm, exhibiting samples for the purpose of affecting such sales, his employment being that which is usually denominated that of a drummer. This business was declared by a statute of Tennessee to be a privilege for which a license tax was required. Robbins

was convicted of a violation of that statute. The statute made no discrimination between those who represented business houses out of the State and those representing like houses within the State. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the ground that whatever the State might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the State, it could not impose upon those who acted as drummers for business houses outside of the State (and who were, therefore, engaged in inter-state commerce) any burden by way of a license tax. The opinion by Mr. Justice Bradley is elaborate and enters fully into a discussion of the question, citing many authorities. It asserts in the strongest language the exclusive power of Congress over inter-state commerce; that its failure to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and whatever may be the extent to which the police power of the State can go, it cannot go so far as to uphold any regulations directly affecting inter-state commerce.

"In the case of Leloup v. Mobile, 127 U. S., 640, a license tax sought to be imposed by the State upon a telegraph company engaged in inter-state commerce, was declared beyond the power of the State.

"Asher v. Texas, 128 U. S., 129. In that case, a statute requiring from 'every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of $35' was declared inoperative so far as it affected one soliciting orders for a business house in another State, and the case of Robbins v. Shelby Taxing District was expressly reaffirmed.

"The same doctrine was applied in Stoutenburgh v. Hennick, 129 U. S., 141, to the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license there, as required by an act of the legislative assembly of the District of Columbia.

"In Lyng v. Michigan, 135 U. S., 161, 166, it was said: 'We have repeatedly held that no State has the right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"In McCall v. California, 136 U. S., 104, 111, it appeared that McCall was an agent in San Francisco, California, engaged in soliciting business for an eastern railroad corporation, but not engaged in selling tickets for that company, or receiving or paying out money on its account, yet it was held that he was engaged in inter-state commerce, and the license tax imposed upon him for the privilege of doing such business was unconstitutional. Mr. Justice Lemar, reviewing the prior cases and replying to the objection that this only indirectly affected the commerce of the road, said: 'The test is: Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it envolves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent.'

"In Crutcher v. Kentucky, 141 U. S., 47, 61, an act of the State of Kentucky which forbade the agent of an express company, not incorporated by the laws of that State, from carrying on business without first obtaining a license from the State, and, as preliminary thereto, that he should satisfy the Auditor of the State that the company he represented was possessed of an actual capital of at least $150,000, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, observed: 'The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulation of inter-state commerce which may have been expressly or im-

pliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon inter-state commerce any more than upon foreign commerce, and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.' "

Justice Brewer stated the conclusion of the court as to the validity of the Titusville ordinance as follows:

"Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on inter-state commerce, and was, therefore, beyond the power of the State."

Some of the State Supreme Courts have made decisions in accord with the position of the defendant in error in the present case.

Gunn vs. Machine Co., 57 Ark., 24.
Allen vs. Tyson-Jones Buggy Co., 40 S. W. Rep. (Tex.), 393, 714.
Miller vs. Goodman, 40 S. W. Rep. (Tex.), 718.
Shaw Piano Co. vs. Ford, 41 S. W. Rep. (Tex.), 198.
State vs. O'Connor, 5 N. Dak., 629.
McNaughton Co. vs. McGirl, 49 Pac. Rep. (Mont.), 651.

These cases as to the facts are very similar, if not substantially identical, with the case at bar.

A cigarette original package case.

State vs. McGregor, 76 Fed. Rep., 956.

III.

The cases in this court where State regulations that interfered with inter-state commerce have been sustained as a proper exercise of the police power of the State have no application to this case.

Emert vs. Missouri, 156 U. S., 296, is the leading case of this class. It involved the validity of a statute requiring peddlers to take out a license.

In the more recent case of N. Y., N. H. & H. R. vs. New York, 165 U. S., 628, 631, Mr. Justice Harlan, speaking for the court, cited a number of cases in connection with the following proposition:

"According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of State regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid, under penalties, the heating of passenger cars in that State by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in inter-state commerce."

We respectfully submit that the judgment below should be affirmed, with costs.

FRED A. BAKER,
Attorney for Defendant in Error.

OLIN L. SADLER,
JOHN A. BRADLEY,
Of Counsel.

No. 109.

Brief of Maynard for State of Mich

The Supreme Court of the United States.

Filed Nov. 18, 1897.

OCTOBER TERM, 1897.

No. 109.

WILLIAM HOLDER,
Plaintiff in error,
vs.
AULTMAN MILLER & COMPANY,
Defendant in error.

Brief of Fred A. Maynard, Attorney General of the State of Michigan.

16,158.

A. VAN DORT
RECORD AND BRIEF PRINTER, GRAND RAPIDS, MICH.
1897

The Supreme Court of the United States.

OCTOBER TERM, 1897.

WILLIAM HOLDER,
Plaintiff in error,
vs.
AULTMAN MILLER & COMPANY,
Defendant in error.

No. 109.

Brief of Fred A. Maynard, Attorney General of the State of Michigan.

This brief is filed on behalf of the State of Michigan, by the Attorney General of that State, in pursuance of an order of the court, permitting him to file a brief.

The State has not been made a party to the suit, which is apparently a controversy between the defendant in error, and its agent, the plaintiff in error, over certain moneys which appear to belong to and be the property of the said defendant, and which said agent has collected and holds, and apparently refuses to pay or deliver over to his principal, to whom it rightfully belongs.

Under this so-called controversy, the counsel, and court below, seem to have made a departure from the case as presented, and have discussed, and undertaken to decide upon the validity of an important Michigan statute relating to the regulation of foreign

corporations doing business tn said State, the filing of articles of incorporation, etc., and the payment of a franchise fee.

The laws of Michigan relating to the incorporation of manufacturing companies were revised in 1885, the revision providing for the incorporation of stock companies for the purpose of carrying on any manufacturing or mercantile business. or any union of the two.

Session laws of Mich. 1885, page 343.
3 Howell's Statutes Sec. 4161a, page 3387.

In 1889, a section was added to said law providing for the qualification under said law of foreign corporations.

Session Laws of Mich. 1889, page 195.
3 Howell's Statutes, Sec, 4161 d 6, page 3397.

Said section reads as follows.

"Sec. 37. Corporations organized under the laws of any State of the Union, or of any foreign country, either wholly or in part for any of the purposes contemplated by this act, upon recording copies of their charter, or articles of incorporation, or memoranda of association, as provided in section nine of this act, and upon filing in the office of the Secretary of State a resolution, as required in general section forty-three hundred and thirty-one of Howell's Annotated Statutes and appointing an agent for service of process, may, for such purposes, carry on business in this State, and shall enjoy all the rights and privileges, and be subject to all the restrictions and liabilities of corporations existing under this act."

In 1891 the legislature passed a law requiring corporations thereafter organized in Michigan to pay a

franchise fee on filing their articles.

Session Laws 1891, page 240.

In 1893, section one of said act was amended in such a way as to give it application to foreign corporations, and also providing as follows:

> "All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

The entire of said section, as annexed, reads as follows:

> "Section 1. The people of the State of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the Secretary of State, and every foreign corporation or association which shall hereafter be permitted to transact business in this State (which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein), shall pay to the Secretary of State a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of said corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore orginized or doing business in this State which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon

any and each subsequent increase thereof: Provided, that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

Session Laws of Mich., 1893, page 82.

The record shows that the defendant in error did business such as is mentioned in said laws, without ever complying in any way with any of said laws, and without paying any franchise fee, and made the contract with plaintiff in error after the said law of 1893 took effect.

The following are the finding of facts and the contract as set forth in the record:

Findings of Facts.

First—On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "Copy of Contract," is hereinafter set forth. Said contract was executed, accepted and approved as set forth in said contract, and in the endorsement on the back thereof.

Second—The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled,

Third—There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56).

Fourth—Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the City of Akron, County of Summit and State of Ohio, and having its manufactory at the same place.

Fifth—Aultman, Miller & Company do not manufacture any goods whatever within the State of Michigan.

Sixth—Aultman, Miller & Company sells its goods in Michigan by means of local commission agents, and it has a general agent at the City of Lansing, in Michigan, and its commission agents are under similar contracts with the plaintiff to the one set forth in this action.

Seventh—All contracts are sent to Aultman, Miller & Company at Akron, for approval or rejection, before taking any effect.

Eight—The goods sold by Aultman, Miller & Company in the State of Michigan, and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents. forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent, or in bulk to Lansing or various points throughout the State, and re-shipped in smaller lots direct to the commission agent.

Ninth—Aultman, Miller & Company own a warehouse in the City of Lansing for the transfer of such re-shipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of

their customers. These are partially commission goods and partially goods sold direct to them.

Tenth—Accounts with every commision agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh—The Plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistants check over the season's work with the commission agent, collect pay for the machines sold, in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth—All notes taken by the commission agents of Aultman, Miller & Company are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth—Aultman, Miller & Company has never filed a copy of its articles of association in the office of the Secretary of State of the State of Michigan, or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan, or in any way complied or attempted to comply with Section 1 of an Act of the Michigan Legislature entitled "An Act to provide for the payment of a franchise fee by corporation," approved July 2, 1891, as amended by Act No. 79 of the Public Acts of Michigan of 1893, approved May 13, 1893. (Public Acts 1891, p. 240; Public Acts 1893, p. 82.)

COPY OF CONTRACT.

This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the State of Ohio), of Akron, Ohio, of the first part, and Wm. Holder, of Laingsburg, County of Shiawassee, and State of Michigan, of the second part, Witnesseth: That the party of the second part is hereby authorized to sell Buckeye Mowers, Reapers and Binders, and extra parts thereof, in the following territory, viz.: Laingsburg and vicinity and Elsie and vicinity, including the Townships of Washington and Elba, in Gratiot County, Chapin, in Saginaw County, and the west half of Fairfield, in Shiawassee County, for and during the season of 1894, on the following terms and conditions, viz.: The party of the second part agrees:

First—To use all reasonable diligence in canvassing and supplying said territory with said machines, and in maintaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines, and harvesters and binders, and not to convass or solicit orders outside of the above territory.

Second—To sell the said machine at the retail list prices authorized by said first party, with freight and c arges from Laingsburg added thereto, on the following terms, viz.. One-half October 1, 1894, one-half October 1, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only, for which settlement must be made with the purchaser on the delivery of machines; and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts; to see that all notes taken for machines sold are drawn on blanks furnished by the said first party, and signed by one or more per-

sons of well-known responsibility; and in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal, amply sufficient to secure a payment in full of all such notes; all notes to bear interest as specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of said notes were not signed by persons of well-known responsibility, then to party of the second part agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third—To endorse with waiver of protest and notice of nonpayment, all notes given by renters, and parties owning no real estate, unless sufficiently secured by chattle mortgage or otherwise, and all notes which on examination by a banker, or other competent authority, chosen by the first party or its general agent, or pronounced not good or insufficiently secured.

Fourth—That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co., until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promply remitted to Aultman, Miller & Co., Akron, Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part, to

said party of the first part, shall be collectible without any relief whatever from valuation or appraisment laws.

Fifth—To see that all machines sold are properly set up and started, and, as far as possible, that they give satisfaction to the purchaser, and to keep a correct record of sales, showing the name and post-office address of each purchaser, with price, terms and date of sale; said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth—To receive all machines, extras or other goods shipped or delivered on account of said first party; to pay the freight on them, keep them well housed, well cared for, free from taxes, and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co., as their interest in said property may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same; ordinary freight charges in all cases to follow machines and extras reshipped; but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh—In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original, and in all cases of repairs so furnished, to have on hand the broken or defective pieces to show at settlement, and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed; and in no case whatever to take from any machine

belonging to the first part any part thereof as extras or repairs; to pay at settlement for all machines on hand, in case of a violation of this clause.

Eighth—To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and in case of failure to make such reports or transfers, to pay said first party for all machines remaining on hand at settlement, unsold by reason of such failure, at the option of said first party.

Ninth—To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract, and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth—To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh—To publish a notice of this agency in one or more newspapers in the above named territory during the months of April, May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above described territory.

The party of the first part further agrees with the party of the second part:

First—To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable

them to fill the orders. No commission will be allowed on orders taken and not filled, nor on machines which have for any cause been returned, and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction af the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made; and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second—To allow said second party as compensation for receiving. handling, storing, selling, setting up and starting machines, and making collection, whenever required, a commission equal to an amount which, deducted from the price for which the machines have been sold, after deducting other allowances of every nature, will make the net amount to be returned by the first party in notes and cash in the same proportion as taken for machines sold as follows, freights allowed:

	Width of Cut.	If sold for Cash.	If sold for Notes.
Buckeye Light Mower, (one horse)	3 feet 9 in.	$32.00	$34.00 each
Buckeye Light Mower	4 feet 3 in.	33.00	35 00 "
New Buckeye Mower	4 feet 6 in.	34.00	36.00 "
New Buckey Mower (to combine)	4 feet 6 in.	.....	..... "
Buckey Mower	5 feet.	35.00	37.00 "
Buckeye Mower	6 feet.	40 00	42.00 "
New Buckeye Table Rake	5 feet 2 in.	.....	..... "
New Buckeye Dropper	5 feet 2 in.	.....	..... "
.....		....	..... "
Buckeye Frameless Binder	5 feet.	90.00	90.00 "
Buckeye Frameless Binder	6 feet.	90.00	95.00 "
Buckeye Frameless Binder	7 feet.	.....	..... "
.....		.....	.... .. "
Buckey Banner Binder	5 feet 3 in.	90.00	95.00 "
Buckey Bundle Carrier for Binders		4.50	..... "
Buckey Flax and Clover Dump		2.70	..... "
Buckeye Binder Truck, 2 Wheeled		6.75	..... "

Where an outfit consisting of Binder. Trucks and Bundle Carrier is sold to one person the net cash price shall be $95.00. Time price $95 00 for 5 feet Machines and $95.90 cash or $100.00 time for 6 ft. Machines.

Third—To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvases, pitman ferrules, spring keys, brass boxes, chain links, bolts and other net goods), from the prices of which as found in the published price list a commission of 25 per cent, will be allowed, all such extras sold to be paid in cash on demand of the first party or their authorized agent.

Fourth—To sell to said second party knives and sickles, and knife and sickle heels, guards, sections and rivets, at a discount of 50 per cent., and pitman ferrules, spring keys, brass boxes, chain links, canvases, bolts and other net goods, at a discount of 50 per cent., all to be paid for in cash on or before te first day of August, 1894.

Fifth—To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

Notice.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlements. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

No canvasser or expert that may be sent to aid you shall have any authority to make any charge whatever in our contract with you, and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or

reduction in price on sales made by him. Nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement, and the first party reserves the right to rescind or annul their contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, The parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT,

This contract not valid unless countersigned by our manager at Lansing, Mich., and App. at Akron. WM. HOLDER.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, Manager.

Across the back of the foregoing contract is the following endorsement: "Approved April 29, 1894. Ira M. Miller, Secretary."

Upon such finding of facts, the court made the following findings of law:

FINDINGS OF LAW.

On the above and foregoing findings of facts, the court finds the following conclusions or findings of law:

1. The business of Aultman, Miller & Co., as carried on under and in pursuance of the said contract, is an inter-state commerce business, and said company is not subject to section 1 of the Michigan Franchise Free Act of 1891, as amended by Act. No. 79 of the Public Acts of Michigan of 1893, and said last named act in so far as it applies or purports to apply to foreign corporation like Aultman, Miller & Co. which are doing in Michigan an inter-state commerse business, is in conflict with the provision of the Constitution of the

United States authorizing Congress to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

2. Said contract was made and executed in the State of Ohio, and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is, therefore, within the protection of the Constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56 with interest at six per cent. from Nov. 3, 1894, and a judgment will, therefore, be entered in favor of the plaintiff and against defendant for $5,212.56 and costs of suit to be taxed.

HENRY H. SWAN,
District Judge.

(Record, p. 23.)

First.

Upon this record it is now claimed, on behalf of the State of Michigan, that the questions relating to the validity and application of the said Michigan laws as stated and found by the court below in the findings of law, were not properly before the court, and are not now properly before the Supreme Court for its decision.

a.

The money sought to be recovered in this case, appears to be the money of the defendant in error, collected by the plaintiff in error as its agent.

The title and ownership of the money was in the former all of the time, and an action in tort might have been maintained for its wrongful conversion under the facts as they appear.

The statutes of Michigan, above referred to do not

purport to countenance or excuse embezzlement by an agent, or any tortious acts whatever by the agents of foreign corporations.

In the case of People vs. Hawkins, 106 Mich. 479, it was expressly held, that under similar circumstances, the money was the property of the principal, and that the agent was properly convicted of embezzlement.

In that case, the Standard Oil Company of Ohio, a foreign corporation, for several years did business in Michigan, having a general office in Detroit, through which its business, for a portion of the state was done. This business was principally done in selling petroleum to customers in this state. The oil was, as a rule shipped to Detroit in tank and other cars and then stored until sold, being then re-shipped. All money received for sales of oil in that portion of the state was sent to the Detroit office, and came to the hands of defendant, who was book-keeper and assistant cashier. He was convicted of embezzling $2600 of the company's money.

After discussing the question of the validity and application of contracts in Michigan by said foreign corporation the court used the following language:

> "But, if it should be held that the act under consideration was prohibitive, and that the company could not make or enforce contracts, it would not follow that this defendant could not be guilty of embezzlement. In fact, he was the agent of the company, whether it was a lawful enterprise or engagement or not.
>
> By virtue of his relation, he became possessed of property which was not his, and which belonged to the company, if to anybody. He acted for, and permitted himself to be held out as the agent of, the company, and received money from var-

> ious persons who were willing to pay. He was a de-facto servant, and it is unnecessary that his relation should have grown out of a lawful contract of agency. It was enough if he acted, and was permitted to act as such."

The money of the company being in the hands of the agent, if the latter refused to pay it over, it may be recovered, without regard to the question whether the original contract of agency was valid or not.

In connection with the above question see the case of

Benefit Society v. Lester, 105 Mich. 716,

where it was held, that a foreign mutual benefit society, which had not complied with the laws of Michigan as conditions for permission to do business in this state, and was forbidden under a penalty from doing business therein, made assessments upon members residing in Michigan, which assessments were by such members voluntarily paid to the agent of said society, who also resided in Michigan, and the agent on demand refusing to pay over such moneys to said society which brought suit in the state court against the agent for such moneys, could not recover such moneys.

In its decision the court used the following language:

> "Under the statute, How. Stat. §8136, the plaintiff is not authorized to maintain this action because the collection of this money 'arose out of' acts of the plaintiff which were forbidden, viz: the doing business and issuing certificates to citizens and residents of Michigan, and the collection of assessments by its agents within the state. See Seamans v. Temple Co. supra. Such collection was the "transaction of the business of insurance. How. Stat. §§4225, 4227, 4244."

The said section 8136 of Howell's Statutes, referred to in the said opinion, is as follows:

"But when, by the laws of this state, any act is forbidden to be done by any corporation or by any association of individuals, without express authority by law and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

It is suggested that there would be this difference between the said last named case, and the People v. Hawkins (above mentioned) as well as the case at bar, that in the former the title and ownership of the money had not passed to the society, while in the latter cases, the title and ownership of the moneys was in the said corporations, respectively.

There still remain the questions whether said statute prohibiting any action arising out of a prohibited act, would apply to the case at bar, and if so whether the federal courts are bound by said statute.

b.

The agent having, by means of his employment, obtained and received into his possession the moneys of his principal, is estopped from asserting the invalidity of the contract whereby he became agent.

The State of Michigan not being a party to this suit, would not be bound by the adjudication made. The State has had no opportunity to be represented at the trial and production of evidence. And if a decision is to be made upon the validity and application of the said statutes, it should only be done when it becomes necessary to the disposition of the case before the court.

Here, in this case, the questions as to the validity

and application of those statutes, are not involved, and the case can be disposed of on the grounds above set forth.

Second.

If the court holds that the question involving the validity and application of the Michigan Statute referred to, is involved in this case, then it is submitted, that the business done by the defendant in error was not commerce between the States, but was doing business in the State of Michigan beyond the scope of interstate commerce laws, and within the condemnation of the Michigan Statutes of 1893.

By the decisions already made, it appears, that when a foreign corporation, sells its goods by an itinerant agent, who takes orders and reports to the house and ships the goods to the purchaser, that such business is protected by the laws relating to commerce between the States.

See Coit & Co. vs. Sutton, 102 Mich. 324, where the following language is used; referring to Act 79 of the laws of Mich. 1893.

> "The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within this State consists merely of sel-

ling through itinerant agents, and delivering commodities manufactured outside of this State."

See also, Kindel v. Beck &c. Co., 35 Pac. R. 538
Gunn v. Machine Co. 57 Ark. 24.

The case at far is different in its facts from such cases.

In the case at bar the defendant in error established warehouses, and depots for storage of its goods, and exhibiting its goods and machines to purchasers.

In other words these warehouses were branches of their general plant or place of business.

The defendant in error was engaged in the business of manufacturing and selling goods.

Its factory was in the State of Ohio; but the mercantile portion of its business, so far as Michigan was concerned, was done by branch houses, and especially by its branch house in the City of Lansing, where a large warehouse was kept and used for the purpose of storing and exhibiting goods and making sales, as well as to supply goods to other local branches established in different parts of the State.

It appears that all the business that could be done by any wholesale or retail mercantile house or store was carried on at such warehouse in Lansing.

Present sales of goods in the warehouse were made in the same manner, as ordinary retail sales are made for cash or on credit.

There were also kept for sale, and to furnish local agents to sell, a large quantity of extra pieces of machinery, and a general depot of material for repairs of the machines sold. The nature of the machines being such, that in order to keep them running as contemplated in the purposes for which they were sold, constant repairs were necessary, and such repairs could best be done by having manufactured pieces of

machinery to put in place of defective, broken or worn out parts of the machine sold.

This was an essential part of the business of defendant in error.

At Lansing it kept a stock of such extra parts of the machines. And this business so done, was as much business exclusively done in Michigan, as if the factory, or a branch factory, were located in Lansing, and the goods there made.

The mercantile part of the business was as important as the manufacturing.

Such business as was done by defendant in error in Michigan differs widely from merely selling their goods by itinerant agents, who takes orders by samples and send their orders to their principals in other states, which principals then ship their goods direct to the customers.

The case of

American Harrow Co. v. Shaffer, 68 Fed. Rep. 750

is similar to the case at bar as to the principal points involved.

The laws of Virginia required every agent who sold manufactured articles in that state should take out a license and pay a license fee, and it applied to residents and non-residents alike.

The complainant was a corporation organized in the State of Michigan, where it manufactured a combined harrow, cultivator and seeder; and sent its agents into Wythe County, Va., to sell said implements. In doing this the said complainants sent their implements by the car load to said county in Virginia, where they were stored in a building in Wytheville. That the agents took the harrows in wagons through the county and sold and delivered them for cash or on credit. Upon the license tax being demanded by the defendant

who was the commissioner of the revenue for Wythe County, Va., the complainants' agents refused to pay it, and suit being begun in the Circuit Court of Wythe County, to collect the tax, the complainant filed its bill of complaint in the U. S. Circuit Court, asking for an injunction restraining the commissioner from collecting the tax, claiming its right to dispose of the goods in the manner stated under the inter-state commerce law.

The federal court dissolved the injunction, and in deciding the case, used the following language:

> "Applying the principles, so distinctly stated in these decisions, to the facts of this case, no other conclusion can be reached than that the agents of complainant were not engaged in selling harrows by sample, taking orders therefor, the orders to be sent to their principal in the state of Michigan, and the harrows so sold on orders forwarded to the purchasers. Had this been the course pursued by these agents, no question could have arisen as to their liability to pay the license tax demanded of them. They would clearly have been exempt from such tax. But when the plaintiff shipped its harrows by car loads from the state of Michigan into the state of Virginia, deposited these goods in a warehouse in the town of Wytheville, and then, through its agents, loaded them on wagons, sent them through the country, selling and delivering them to purchasers from the wagons, it cannot be claimed that they were engaged in interstate commerce."

The above case states the rule, which is claimed in the case at bar:

1st That the business described was not interstate

commerce, because, the agent having the goods of the foreign corporation in his possession in the state sold the goods and delivered them: and

2nd. Because the foreign corporation established a warehouse and depot in the state for the storage and sale of its goods, and at such warehouse sold its goods and distributed them for sale.

An examination of the Michigan Act No. 79, 1893, providing for the payment of a franchise fee, shows that it does not discriminate between foreign corporations and domestic corporations.

All are required to pay the same fee.

And when the fee is paid by a foreign corporation, and its articles filed, and an agent duly appointed on whom process against the corporation may be served in Michigan, such foreign corporation then becomes entitled to do business in the State, and enjoys all the rights and privileges of a domestic corporation.

3 Howells Statute Sec. 4161 d 6.

Third.

The contract set forth in the record in this cause is within the prohibition of the Michigan Statute, Act 79 of the laws of 1893.

a.

The contract was made in the State of Michigan.

b.

Whether the last formal act of approval was done in this State, or not, the contract is within the prohibition of the Statute, because it contemplated and expressly provided for the doing of business in this State.

It provided:

1.

The making of sales and delivery of goods to purchases by the agent of the Company in Michigan: see first part of contract and No. 1 on page 1 of record, and Nos. 2 and 10 of contract on pages 2 and 3 of record.

2.

The establishment of a warehouse in Michigan for the storage of the goods of the Company in Michigan and sales there-from.

See Nos. 4 and 6 of contract on pages 2 and 3 of record.

3.

Said contract provides that plaintiff in error, under and pursuance of the contract. shall make other contracts for and in behalf of the Company, and as its agent in Michigan without the special approval of the Company on each contract at some point outside of this State.

c.

If it shall be held that the contract set forth in the record, was not made in this State, by reason of the formal approval being made in Ohio, then it is claimed that said contract is a plain evasion of the Michigan Statute; and on such ground it should be held that it comes within the prohibition of the Statute.

Upon this point see Seamans v. Temple Co. 105 Mich. 404, where the court uses the following language:

> "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were

intended merely to prevent the act of making the contract in this State. The object is to protect the citizens of this State against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this State. American Insurance Co. v. Stoy, 41 Mich. 401; Hartford Fire Insurance Co. v. Raymond, 70 Id. 501.

The argument of counsel for plaintiff is substantially this:

'We know that the laws of Michigan are designed to prevent our insuring Michigan property, but we have done so in a way that does not contravene the letter of the Michigan statute.

We have made our contract through the mail, and we have committed no violation of the Michigan statute, because we have done nothing upon Michigan soil. We have evaded your law, and obtained a contract which you have sought to prohibit, and now we ask you to enforce it for us under the doctrine of State comity.'

Under such circumstances, the courts of the state are not open to the offending company and the rule of state comity cannot be involved in its behalf."

In behalf of the State the Attorney General claims that the decision of the court below should be reversed.

FRED A. MAYNARD,
Attorney General of the
State of Michigan.